IN THE

Supreme Court of the United States

MARCH TERM, 1979

No. .....
78-1788

HENRY POLIAK, INC., *et al.*,
Petitioners,

v.

W. MICHAEL BLUMENTHAL, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Henry Pollak, Inc., and one hundred and fifty-one (151) other corporations and companies, all organized under the laws of the several states of the United States, petition for a writ of certiorari to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit affirming without opinion the decision of the United States District Court for the District of Columbia dismissing for lack of subject matter jursdiction petitioners' civil actions to recover under Section 9(a) of the Trading with the Enemy Act (50 U.S.C. App. 9(a)) monies taken by Executive action under Section 5(b) of that Act.

Opinions Below

The decision of the United States Court of Appeals for the District of Columbia Circuit was issued on March 1,

1979, and the mandate thereunder on March 27, 1979. The decision will not be published according to Local Rule 8(f) of that Court. The decision and memorandum opinion of the United States District Court for the District of Columbia (June L. Green, J.) is reported at 444 F. Supp. 56 (1977). The decisions and opinion of the Courts below are reproduced in the Appendix to this petition at pp. 1a through 13a.

The District Court held that Section 9(a) of the Trading with the Enemy Act, specifically granting jurisdiction to the district courts to hear suits in equity filed thereunder, did not suffice to confer jurisdiction on the court to hear claims for the return of property taken under Section 5(b) of the Trading with the Enemy Act, because section 9(a) as a whole does not apply to taking of property in peacetime national emergency.[1]

The United States Court of Appeals affirmed the decision of the District Court without opinion, stating simply that: "This court is in agreement with the result reached by the District Court, generally for the reasons given in its memorandum opinion." (*see:* Appendix, p. 1a)

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1256. The judgment of the United States Court of Appeals for the District of Columbia Circuit is dated March 1, 1979, and the mandate was entered on March 27, 1979.

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[1] 444 F. Supp. at 59, footnote 2, *see:* Appendix hereto, p. 10a. This footnote conclusion, which is the sum of the district court's reference to section 9(a), under which the civil actions below were instituted, resulted in the court's conclusion that these matters are within the exclusive jurisdiction of the Customs Court. Petitioners believe both conclusions to be erroneous.

Questions Presented

1. May American citizens, whose property has been taken during "peacetime" national emergency pursuant to powers delegated to the Executive by Section 5(b) of the Trading with the Enemy Act, maintain suit in equity in the District Courts of the United States pursuant to the remedial provisions of Section 9(a) of that Act, claiming any right, title, or interest in said property and requesting its return?

2. If not, is the Trading with the Enemy Act as so applied violative of the rights guaranteed to citizens by the Due Process and Just Compensation clauses of the Fifth Amendment to the Constitution of the United States?

Constitutional and Statutory Provisions and Proclamations Involved*

Constitution of the United States, Amendment V, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Tariff Act of 1930, Section 350(a)(6), as amended, 19 U.S.C. 1351(a)(6)

Trade Expansion Act of 1962, Section 255(b), as amended, 19 U.S.C. 1885(b)

Trading with the Enemy Act, 40 Stat. 411, section 2, 50 U.S.C. App. 2

Trading with the Enemy Act, as amended, section 5(b), 50 U.S.C. App. 5(b), in pertinent part:

> (b)(1) During the time of war [or during any other period of national emergency declared by the Presi-

*[All provisions, statutes and proclamations involved are set out *in extenso* in the Appendix hereto, p. 14a, ff.]

dent,] the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses or otherwise—

* * * *

(B) . . . regulate . . . importation . . . or transactions involving, any property or interest in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President . . .

Trading with the Enemy Act, as amended, section 7(c), 50 U.S.C. App. 7(c)

Trading with the Enemy Act, as amended, section 9(a), 50 U.S.C. App. 9(a), in pertinent part:

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, . . . may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, . . . to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by . . . the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. . . .

28 U.S.C. 1582, Jurisdiction of the Customs Court

Presidential Proclamation 4074, August 16, 1971, 36 Fed. Reg. 15724

Presidential Proclamation 4098, December 20, 1971, 36 Fed. Reg. 24201

Statement of the Case

This case presents an important issue of the construction of the remedial provision of the Trading with the Enemy Act (50 U.S.C. App. 1, *et seq.*, hereinafter referred to as "TWEA") and the rights of United States citizens to be secure that their property will not be taken and retained in "peacetime" by the Executive branch of the federal government without due process of law and just compensation.

At issue is whether corporations, citizens of the United States, may make claim in the district courts of the United States pursuant to section 9(a) of the TWEA for the return of monies paid into the Treasury of the United States pursuant to a Presidential Proclamation held to be valid by a court of the United States only as an exercise of the President's powers pursuant to Section 5(b) of the TWEA.

On August 15, 1971, President Nixon declared a national emergency and issued Presidential Proclamation 4074, effective August 16, 1971, which imposed a "surcharge" assessment, *i.e.*, a demand for supplementary payments "in the form of customs duties" (*see:* Appendix, p. 28a) in the amount of up to 10% *ad valorem* upon most dutiable merchandise imported from the free world.

On September 29, 1971, an Opinion of the General Counsel of the Treasury entitled "Legal Basis for the Imposition of a Surcharge" was issued (*see:* Appendix, p. 35aff.). It stated that the legal authority for the assessment lay in section 350(a)(6) of the Tariff Act of 1930, as amended, and section 255(b) of the Trade Expansion Act of 1962. Neither the legal opinion nor the proclamation specifically mentioned the Trading with the Enemy Act as possible authority for the Executive action.

On December 20, 1971, President Nixon issued Proclamation 4098 terminating the "surcharge", the stated reason being the "multilateral [currency] agreement . . . reached among the Group of Ten major industrial nations," the so-called "Smithsonian Agreement."

Shortly thereafter, the President stated: "The Surcharge was not imposed to raise revenue but to provide the U.S. external position with some temporary protection." [Economic Report of the President 70 (1972)]

Subsequently, importers brought suit in the United States Customs Court, claiming that the assessment in the form of customs duties was an *ultra vires* act by the President under the specific statutes referenced to justify it. This claim of illegality was sustained by both the Customs Court and the Court of Customs and Patent Appeals in *Yoshida International, Inc.* v. *United States,* 71 Cust. Ct. 1, C.D. 4550, 387 F. Supp. 1155 (1974) and in *United States* v. *Yoshida International, Inc.,* 63 CCPA 15, C.A.D. 1160, 526 F. 2d 560 (1975). However, the latter tribunal found, as a matter of first impression, that the Presidential action was justified by Section 5(b) of the Trading with the Enemy Act, and was *only* justified under that Act. That decision was affirmed in *Alcan Sales Division* v. *United States,* 63 CCPA 83, C.A.D. 1170, 524 F.2d 937 (1976), and this Court denied *certiorari,* 389 U.S. 976 (1976).

The source of the Presidential delegation of power having been thus located, petitioners brought suit in the United

States District Court for the District of Columbia stating that, as non-enemies or allies of enemies of the United States, they claimed continuing right, title, or interest in the monies transferred into the General Treasury of the United States by virtue of Presidential Proclamation 4074. This claim was asserted under Section 9(a) of the TWEA, which also specifically confers jusisdiction upon the district courts sitting in equity to hear such claims.

The District Court dismissed petitioners' complaints, finding that jurisdiction of claims relating to the "surcharge program" were cognizable only in the Customs Court. The District Court did not hold that petitioners failed to state a cause of action under Section 9(a) of the Trading with the Enemy Act. Instead, it held as follows:

> . . . plaintiffs' reliance upon Section 9(a) of the Trading with the Enemy Act, 50 U.S.C. App. 9(a), to buttress its [sic] jurisdiction argument is without merit. Section 9(a) was enacted in 1917 to serve as a companion to the original version of Section 5(b). When Section 5(b) was amended in the 1930's and 1941 to apply to situations involving not only alleged enemies but also peacetime periods of national emergency and business involvements with foreign nations in general, Section 9(a) was not modified to keep it pertinent to these situations. It is obvious on its face that 9(a) confers jurisdiction upon the federal district courts only to consider challenges to the wartime applications of Section 5(b) and to identifications of parties as "enemies". Section 9(a) is not relevant to those portions of Section 5(b) which empower the President to regulate foreign trade during peacetime. [sic] [444 F. Supp. at 59]

This holding, although not supported by respondents herein, was affirmed by the United States Court of Appeals for the District of Columbia Circuit, without opinion.

Thus, the courts below have not held that a claim under Section 9(a) of the TWEA may be heard in the Customs Court. They have held that this section of the Act of Congress does not apply to these claims, because the claims result from a taking in time of national emergency (sometimes hereinafter "peacetime") and not in time of war.

Reasons for Granting the Writ

The courts below have decided more than a mere jurisdictional issue. They have decided an issue which has never been squarely addressed by this Court: does section 9(a) of the Trading with the Enemy Act allow claims for return of property of American citizens *whenever* seized and held by the Executive branch under powers conferred upon it by Section 5(b) of that Act?

This issue has been resolved by these lower courts in favor of a limitation upon the remedy enacted by Congress, and a resulting refusal of jurisdiction to sit in equity.[2] This interpretation of the statute conflicts not only with the usual principles of statutory interpretation, but also with this Court's precedential interpretations of this very section of the TWEA. The remedial section of the TWEA was enacted to meet the Constitutional imperative that the property of citizens not be taken for public use without due process and just compensation. The interpretations enunciated by this Court were likewise intended to free the statute from Constitutional doubt as a war measure.

Thus, the decision of the courts below refusing to apply those principles to "peacetime" takings under the statute, and thus denuding it of a remedial provision intended by

[2] The Customs Court does not have equitable powers, *see: Flintkote Co.* v. *United States*, —— Cust. Ct. ——, C.R.D. 79-5, 13 Customs Bulletin No. 12, p. 53 (1979).

Congress, pose an issue of the gravest Constitutional nature. This issue is important not only to petitioners, but to all others who may, at a later time, have property taken, either directly or through taxation, by the Executive in "peacetime", by virtue of powers delegated, or claimed to be delegated, under the TWEA Act, or other statutes.*

I. The Courts below have Decided an Issue of First Impression under the Trading With the Enemy Act and have Decided it in a Manner Not in Harmony with the Decisions of this Court.

The exact issue decided by the lower courts, *i.e.*, whether Section 9(a) of the TWEA entitles citizens to sue in the district courts for return of their property taken in peacetime emergency pursuant to the exercise of Executive power under section 5(b) of the Act, has never been addressed by this Court.

However, the intent with which the statute was passed, and explicit prior holdings of this Court as to the scope and policy of section 9(a) all clearly indicate that the Courts below have erred in refusing even to hear petitioners' suits.

The statute, as passed in 1917, granted the President authority to seize any property which might be thought to be held by enemies or allies of enemies. Congress was distressed by such possibility of Executive action without recourse to the Courts before the seizure, but its fears were allayed by the testimony guaranteeing Congress that American citizens had the right to sue for the return of their property, if it were seized by mistake or overzealous-

* The authority to "regulate", the term held in *Yoshida, supra*, to give the President power to tax, remains as a part of the International Emergency Economic Powers Act, 91 Stat 1626, Pub. L. 95-223, Title II, Dec. 28, 1977.

ness.[3] The following exchange between Chairman Adamson of the House Committee on Interstate and Foreign Commerce and Mr. Charles Warren, who drafted the legislation, clearly sets forth the intended scope of the remedial provision, Section 9, now section 9(a):

> The Chairman. With Mr. Moore's permission, I should like to ask Mr. Warren if there is anything in this bill that would prevent any loyal citizen of this country whose rights were infringed from bringing suit to enforce his rights against the custodian *or anybody else.*
>
> Mr. Warren. I do not know of any. [*Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 4704,* 65th Cong., 1st Sess., May 29th, 31st and June 4, 1917, p. 54. Emphasis supplied.]

Section 9(a) was intended to allow any citizen to bring suit in equity claiming any right, title, or interest in the property which had been taken from him under the Act.

What is more, this Court held in *Commercial Trust Company of New Jersey* v. *Miller,* 262 U.S. 25, 53 (1923), that such suits lie without regard to the reasons for the Executive's action under Section 5:

> In other words, and in comprehensive description, the act may be denominated an exercise of governmental power in the emergency of war, and its procedure is accommodated to and made adequate to its purpose, but securing, as well, the assertion of opposing or countervailing rights "by a suit in equity, unembarrassed by the President's executive determination,"

[3] Section 9(a) does not use the term "seize" but rather pertains to monies and other property transferred to the Alien Property Custodian or the Treasurer of the United States. This Court held early on that "property required to be transferred and property seized stand on the same footing . . ." *Central Union Trust Co.* v. *Garvan,* 254 U.S. 554 (1921).

> and, if the claimant prevails, the property is to be forthwith returned to him.

The reasoning employed by the District Court below and adopted by the Court of Appeals for denying subject matter jurisdiction was that when section 5(b) of the Act was amended in 1933 and in 1941 ". . . to apply to situations involving not only alleged enemies but also peacetime periods of national emergency and business involvements with foreign nations in general, Section 9(a) was not modified to keep it pertinent. . . ." The conclusion thus reached by the courts below is that while the reach of the statute expanded to other than war emergencies and to property interests other than those of enemies, the remedial provision of section 9(a) was not commensurately expanded. This construction of the proper scope to be given to section 9(a) runs counter to a clear line of decisions by this Court requiring a broad construction of this remedial provision.

In the last decision of this Court construing the remedial provision of the TWEA before its amendment in 1941, *Becker Steel Co.* v. *Cummings,* 296 U.S. 74 (1935), the plaintiff, an American citizen, sought to challenge the deduction by the Alien Property Custodian of an administrative expense attributable to a sale of Becker's property which had been seized. The Alien Property Custodian had paid over the difference and claimed that neither he nor the Treasurer had any property to repay under Section 7(c). This Court said in response to this technical contention:

> Only compelling language in the congressional enactment will be construed as withdrawing or curtailing the privilege of suit against the government granted in recognition of an obligation imposed by the Constitution. . . . Hence Section 9(a) must be broadly construed to give effect to its remedial purpose. [296 U.S. 74, at 79]

This Court thus directed that suit should proceed, and indicated that a judgment would be rendered, even if no property were held by the Alien Property Custodian, to be paid from the General Treasury.

Nothing contained in the amendments enacted in the 1930's or in the First War Powers Act of 1941[4] sufficed to shake this Court's interpretation of the scope of the remedial provision of this statute, although there were consistent contentions by the Government that the amendments, cited by the District Court in this case, had limited the relief which might be obtained by suit under section 9(a).

It was claimed first that section 9(e) which limited the time within which First World War claims could be brought, foreclosed any claim for relief under section 9(a) for seizure during the Second World War. This Court, in *Markham* v. *Cabell,* 326 U.S. 404 (1945), held:

> The right to sue, explicitly granted by § 9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission. We can find no indication in the 1941 legislation that Congress by amending § 5(b) desired to delete or wholly nullify § 9(a). *On the contrary, the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole. We should give each as full play as possible.*
>
> [326 U.S. at 409]

In *Clark* v. *Uebersee Finanz-Korporation, A.G.,* 332 U.S. 480 (1947), the Alien Property Custodian sought dismissal

[4] It was the First War Powers Act which added the words "regulate . . . importation . . ." upon which the decision in *Yoshida, supra,* was grounded.

of a suit brought by a neutral corporation for return of its property vested under section 5(b). The contention was that, because neutral corporations could be used to cloak enemy interests, it had been the purpose of the amendment of section 5(b) to seize their property entirely and finally, without remedy under section 9(a). It was argued that, since section 9(a) had not been amended when section 5(b) was expanded, Congress meant to restrict the scope of section 9(a) and deny suit by neutral or friendly aliens in the district courts.

This Court held that suit would lie, and stated:

> We find not the slightest suggestion that Congress was concerned under this Act with property owned or controlled by friendly or neutral powers and in no way utilized by the Axis. Those interests were not waging economic warfare against the United States . . . Our hesitation is, moreover, increased when we note that § 7(c) makes the remedy under the Act the only one Congress has granted a claimant. It is not easy for us to assume that Congress treated all non-enemy nations, including our recent allies, in such a harsh manner, leaving them only with such remedy as they might have under the Fifth Amendment. [332 U.S. 487-488]

This Court further stated the guiding principle of construction of this much amended statute to be:

> We are dealing with hasty legislation which Congress did not stop to perfect as an integrated whole. Our task is to give all of it—1917 to 1941—the most harmonious, comprehensive meaning possible.

This Court did so by resolving any doubts in favor of a remedy, *i.e.,* an equitable determination by the courts given jurisdiction under the Act.

Finally, in *Kaufman* v. *Societe Internationale,* 343 U.S. 156 (1951), where an innocent American stockholder sought

to intervene to prevent settlement of a suit brought by *Societe* for return of its property, after the Swiss stockholders had been found tainted, this Court held that, if the United States citizens' rights were better than those of the corporation, they might intervene in the Section 9(a) suit before the property was liquidated, even though the statute gave them no such right on its face. The reasoning was that an entire remedy is to be given to citizens of the United States under section 9(a):

> While Congress has clearly provided for forfeiture of enemy assets, it has used no language requiring us to hold that innocent interests must be confiscated because of the guilt of other stockholders. Nor does any legislative history pointed out persuade us that Congress intended to inflict such harsh consequences upon the innocent. We decline to read such a Congressional purpose into the Act.
> [343 U.S. at 159]

The clear teachings of the cases decided by this Court are that the expansion of section 5(b) by amendment in the 1930's and in 1941 in no way can be read to restrict the scope of Section 9(a) *(Clark* v. *Uebersee, supra);* and that where Congress, by amendment, meant the Act to apply to post World War I situations, section 9(a) will be read to apply as well *(Markham* v. *Cabell, supra).* Indeed, other sections of the Act will be deemed modified where on their face they may appear to limit section 9(a) (section 9(e) in *Markham, supra,* and section 2 in *Uebersee, supra).*[5] The lodestar for construing the scope of

[5] The district court indicated that the plain meaning of section 9(a), by its reference to "enemies and allies of enemies" precludes any application for the section to "peacetime" takings.

In *Uebersee, supra,* the claim was made that the definition of "enemy" and "ally of enemy" contained in section 2 of the

(footnote continued on following page)

section 9(a) is that it must be given broad sweep to give effect to its remedial purpose, *i.e.,* ". . . to secure to the non-enemy owner either the return of his property or compensation for it . . ." *(Becker Steel Co.* v. *Cummings, supra).*

The unprecedented and unfounded restrictive interpretation of section 9(a) by the courts below is directly contrary to these teachings and should be reviewed.

In addition to being in clear conflict with the precedents set by this Court, the decisions of the courts below have interpreted the entire remedial section of the TWEA as having *no* application to the taking of property of citizens of the United States by *ex parte* Executive action, only because such action took place in "peacetime". In so doing, the lower courts have *pro tanto* nullified an Act of Congress which was intended to function in war and in peace, and to function as a whole. No authority has been cited for such drastic action, and petitioners are aware of none which could be. Respondents in their briefs

(footnote continued from preceding page)

TWEA, if read into section 9(a), would defeat the Congressional purpose in amending section 5(b). This Court agreed that section 2, if taken literally, would result in a conflict in the statute and held:

> So if the definitions contained in § 2 are to be harmonized with the policy underlying § 5(b) and § 9(a) of the amended Act, we would have to say that they are merely illustrative, not exclusionary.
>
> • • •
>
> We are dealing here with conflict and confusion in the statute. Though neither § 2 nor § 9(a) was amended with § 5(b) in 1941, one of them must be read differently after than before the event. We believe it is more consonant with the functions sought to be served by the Act to apply § 2 differently than it was previously applied than to read § 9(a) more restrictively. [322 U.S. 489]

Thus, this Court has indicated the solution to the district court's expressed difficulty with the precise wording of the TWEA.

to the Court of Appeals have not supported this interpretation of the Act. The result, however, leaves citizens without protection under the statute, or others like it, from actions by the Executive during declared national emergency which may not comport with the intent of Congress not to take any property of citizens without a hearing.

The decisions below should be reviewed by this Court or, at the least, the matter should be remanded with instructions to grant a hearing on the claims, a request which, up to now, has never been denied to a friendly alien, must less to United States citizens.

II. The decisions below raise grave doubts that the entire Trading with the Enemy Act is Constitutional, an issue which this Court has resolved only on the basis of the availability of suit under Section 9(a).

The Trading with the Enemy Act provides for the taking of property of American citizens, both in time of war and during national emergencies, by summary action of the Executive branch of the federal government. This action, as regards the individual whose property is taken, is carried out without specific findings of fact or any opportunity for a hearing. The citizen is required to transfer his property on command of the Executive or his delegates.

This Court has repeatedly stated that such summary action would pose the gravest of constitutional problems regarding this statute, if it were not tempered by the availability of a claim for return under Section 9(a). Such was the predicate of the holdings in *Central Union Trust* v. *Garvan,* 254 U.S. 554 (1921), quoted *supra,* in *Stoehr* v. *Wallace,* 255 U.S. 239 (1921), and in *Russian Volunteer Fleet* v. *United States,* 282 U.S. 481 (1932). The reasoning in these pre-World War II cases was summarized by Mr. Justice Stone writing for the majority

of this Court in *Becker Steel Corp.* v. *Cummings,* 296 U.S. 74, 79 (1935):

> The seizure and detention which the statute commands and the denial of any remedy except that afforded by Sec. 9(a) would be of doubtful constitutionality if the remedy given were inadequate to secure to the non-enemy owner either the return of his property or compensation for it. * * *

After the amendment of Section 5(b) by the First War Powers Act of 1941 (the amendment which added the regulation of importation upon which the decision in *Yoshida, supra,* was grounded), this Court continued to state that, without adequate relief under Section 9(a), grave doubts as to the statute's constitutionality would be raised. These this Court has chosen to avoid, by resolving all doubt in favor of allowing suits under Section 9(a). *Markham* v. *Cabell, supra, Clark* v. *Uebersee Finanz-Korp., supra,* and *Kaufman* v. *Societe Internationale, supra,* all state clearly that suit under section 9(a) is never precluded, even as to aliens, by finding the section itself inoperative.

The fundamental constitutional question was raised again in *Guessefeldt* v. *McGrath,* 342 U.S. 308 (1952) in which a German citizen filed suit under Section 9(a).

Mr. Justice Frankfurter, writing for the majority of this Court, stressed the constitutional problems which dismissal of the action would raise:

> . . . decision for the Government would require us to decide debatable constitutional questions. In suits by United States citizens, § 9(a) has been construed, over the Government's objection, to require repayment of just compensation when the Custodian has liquidated vested assets. . . . Such a construction, it is said, is necessary to preserve the Act from constitutional doubt. . . .
>
> * * *

> Certainly, the constitutional problem is not imaginary, and the claim not frivolous which would have to be rejected to decide in the Government's favor. Considering that confiscation is not easily to be assumed, a construction that avoids it and is not barred by a fair reading of the legislation is invited. [342 U.S. 317-319]

Again, in *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958), Mr. Justice Harlan, writing for a unanimous Court, stated:

> Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a hearing as to the propriety of the seizure. [357 U.S. 211]

Petitioners are citizens of the United States. Their property was taken during a period of national emergency to allow the President of the United States to bring pressure to bear on foreign nations for the purpose of the negotiation of a multi-lateral monetary agreement. Petitioners' property was thus, beyond question, seized and taken over into the Treasury of the United States for the public good. Millions of other Unied States citizens were benefited by the negotiation of the agreement. The summary seizure of petitioners' property thus served the public good.

The forfeiture of that property, however, without claim for its return under section 9(a) of the statute poses the very constitutional questions which this Court has sought to avoid. Moreover, it casts into doubt the status of property such as was the subject of *Nielsen* v. *Secretary of the Treasury,* 424 F. 2d 833 (C.A.D.C., 1970), *Richardson* v.

Simon, 560 F. 2d 500 (C.A.2, 1977), and *Sardino* v. *Banco Nacional de Cuba,* 361 F. 2d 106 (C.A.2, 1966), *cert. den.* 385 U.S. 898 (1966), which has been held under blocking provisions of the Foreign and Cuban Assets control programs, the consequences of "peacetime" Executive use of the statute. This Court has never reviewed such decisions of the lower courts, presumably because, if such property were ever finally taken, the claimants would be able to maintain suits under section 9(a). Thus, the decisions below will foster renewed litigation on this point.

Finally, the decisions below presume that all questions regarding the surcharge program were resolved by the *Yoshida* decision, *supra,* and that petitioners have somehow begun an untoward and unprecedented "second wave" of litigation seeking to upset the effect of that decision. As stated by the Court of Customs and Patent Appeals,

> The sole issue before us is whether the Customs Court erred, as a matter of law, in holding that Proclamation 4074 was an ultra vires Presidential act. [526 F. 2d 560, 571]

That Court decided that the action, if predicated upon Executive powers to regulate importation under section 5(b) of the TWEA, was not *ultra vires.* It did not decide, nor could it have, that a sequential action in the forum designated by Congress in section 9(a) would not indicate that the property thus regulated for the national good should be returned. The district court, in holding that it has no jurisdiction because section 9(a) has lost all meaning for takings in time of national emergency, seems to believe that taxation was the result of Proclamation 4074, not regulation. This Court should hear this case and resolve finally this issue, because it is clear that if, under a delegation to regulate various matters, including importation, the Executive has been granted the power of taxation by fiat of any property in which any "foreign interest" may arguably subsist, the danger posed to the

republic and to our Constitutional form of government is on-going and of tremendous national importance.

Conclusion

Because the decisions of the courts below conflict with the canons of liberal construction of section 9(a) of the Trading with the Enemy Act which this Court has set forth, and raise issues of constitutional importance, petitioners pray this Court to grant the instant writ.

Respectfully submitted,

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Order of the United States Court of Appeals for the District of Columbia Circuit.

Not to be published—see Local Rule 8 (f)

UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

[No Opinion]

No. 78-1168 September Term, 1978

Civil Action No. 77-1177

HENRY POLLAK, INC., Appellant

v.

W. MICHAEL BLUMENTHAL, Secretary of the Treasury, United States Treasury Department, *et al.*

And Consolidated Cases Nos. 78-1169 through 78-1172 and 78-1174 through 78-1190.

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, Chief Judge, and MCGOWAN and LEVENTHAL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. While the issues

Order of the United States Court of Appeals for the District of Columbia Circuit.

presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

This court is in agreement with the result reached by the District Court, generally for the reasons given in its memorandum opinion. *See* Appellant's Appendix at 47a-57a.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court
GEORGE A. FISHER
George A. Fisher
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

United States Court of Appeals
for the District of Columbia Circuit
FILED MAR 1 1979
GEORGE A. FISHER
CLERK

Order of the United States District Court for the District of Columbia Dismissing the Instant Actions for Lack of Subject Matter Jurisdiction and Memorandum Opinion.

ORDER

This matter having come before the Court on defendants' motion pursuant to F.R.Civ.P. 12(b)(1) to dismiss the complaints on the ground that the Court lacks jurisdiction over the subject matter, and the Court having considered at length defendants' memorandum in support of their motion and plaintiffs' memorandum in opposition, the Court hereby grants the motion.

An opinion accompanies this order.

JUNE L. GREEN
June L. Green
U.S. District Judge

Dated: November 23, 1977

MEMORANDUM OPINION

Plaintiffs in these actions sue for the return of funds collected from them by defendants, who acted in accord with Presidential Proclamation No. 4074, issued August 15, 1971. Proclamation No. 4074 imposed a surcharge upon articles imported into the United States and subjected to customs duties. Defendants have moved the Court under F.R.Civ.P. 12(b)(1) to dismiss the complaints on the ground that the Court lacks jurisdiction over the subject matter. The Court grants defendants' motion for the reasons given below.

I.

During the summer of 1971, the United States was faced with an economic crisis.[1] The nation suffered under an

[1] This account of the economic and political circumstances which preceded issuance of the Proclamation is borrowed verbatim from *United States* v. *Yoshida Intern., Inc.*, 426 F.2d 560 (1975).

exceptionally severe and worsening balance of payments deficit. The gold reserve backing of the U.S. dollar had dropped from $17.8 billion in 1960 to less than $10.4 billion in June of 1971, reflecting a growing lack of confidence in the U.S. dollar abroad. Foreign exchange rates were being controlled by some of our major trading partners in such a way as to overvalue the U.S. dollar. That action, by stimulating U.S. imports and restraining U.S. exports, contributed substantially to the balance of payments deficit. As one step in a program designed to meet the economic crisis, the President issued Proclamation 4074, which was entitled *Imposition of Supplemental Duty for Balance of Payment Purposes* and stated in relevant part:

> WHEREAS, there has been a prolonged decline in the international monetary reserves of the United States, and our trade and international competitive position is seriously threatened and, as a result, our continued ability to assure our security could be impaired;
>
> WHEREAS, the balance of payments position of the United States requires the imposition of a surcharge on dutiable imports;
>
> . . .
>
> NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, acting under the authority vested in me by the Constitution and the statutes, including but not limited to, the Tariff Act [of 1930], and the TEA [Trade Expansion Act of 1972 [sic]], respectively, do proclaim as follows:
>
> A. I hereby declare a national emergency during which I call upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States.

> B. (1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from those made effective pursuant to the terms of this Proclamation.
>
> (2) Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 percent ad valorem. Such supplemental duty shall be imposed on all dutiable articles imported into the customs territory of the United States. . . .

The Proclamation went on to delegate broad discretion to the Secretary of the Treasury to conduct the surcharge program, including power to reduce or entirely eliminate the surcharges on any or all articles if he felt the balance of payments situation had changed. The Secretary was authorized also to prescribe rules and regulations to carry out his responsibilities.

On December 20, 1971, a little over four months after the surcharges went into effect, President Nixon issued Proclamation No. 4098 terminating the program. The reason given was the formulation of a multilateral agreement among the major industrial nations which alleviated the balance of payments problem.

Following payment of the surcharges, a number, although presumably not all, of the plaintiffs in the cases before us filed protests with the United States Customs Service pursuant to 19 U.S.C. § 1514. That statute, part of the Tariff Act of 1930, as amended, permitted administrative review of decisions by a customs officer, including "the

legality of all orders and findings entering into" such decisions. The subject matter of the decisions covered by 19 U.S.C. § 1514 was defined to include "the classification and rate and amount of duties chargeable" and "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury." Apparently a large number of protests against the surcharges were lodged, having similar thrusts; they raised the question of the President's constitutional authority to impose the surcharges.

One importer, Yoshida International, Inc., filed suit in the U.S. Customs Court upon denial of its administrative protest. The statute defining the jurisdiction of the Custom Court provides,

> (a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involves: . . . (2) the classification and rate and amount of duties chargeable; (3) all charges and exactions of what ever character within the jurisdiction of the Secretary of the Treasury . . . 28 U.S.C. § 1582.

The language of this statute, it will be noted, tracks the language setting out the subject matter of 19 U.S.C. § 1514, and provides for judicial review of the administrative decisions made under that provision.

In view of Yoshida's suit joining the issue of the President's authority to impose the surcharge by proclamation, Congress passed Section 611 of the Trade Act of 1974, P.L. 93-618, 88 Stat. 2075. *Entitled* [sic] *Review of Protests in*

Import Surcharge Cases, the provision provided that "in the case of any protest . . . involving the imposition of an import surcharge in the form of a supplemental duty pursuant to Presidential Proclamation 4074", the time for administrative review of the protest was extended to five years from the date the protest was first filed. The protests filed by various plaintiffs in the cases now before this Court were among those held up pending the outcome of the Yoshida litigation.

On November 6, 1975—within the period of the five-year freeze imposed by Section 611—the United States Court of Customs and Patent Appeals reversed a decision of the Customs Court and found the import surcharge program to have been a valid exercise of Presidential authority, on the ground that Congress had provided the President an appropriate statutory delegation of the Congressional power to regulate Commerce. *United States* v. *Yoshida Intern., Inc.,* 526 F.2d 560 (1975). On June 3, 1976, the Court of Customs and Patent Appeals ruled against a second importer who had filed an identical suit in Customs Court, on the grounds that *Yoshida* and the principle of *stare decisis* disposed of the case despite the fact that different goods were involved. *Alcan Sales* v. *United States,* 534 F.2d 920 (1976). The Supreme Court denied certiorari in the *Alcan* case on November 29, 1976, and the question of the validity of the surcharge program would seem to have been settled.

II

Nevertheless, plaintiffs in the instant cases have initiated a new wave of litigation in the federal district court, seeking to undo all the jurisprudence crafted by the Court

of Customs and Patent Appeals. Their argument for district court jurisdiction grows out of their reading of *Yoshida*. *Yoshida* declared that the Congressional delegation of surcharge authority to the President was included not in any statutes explicitly denominated as trade statutes, such as the Trade Act of 1930 or the Trade Expansion Act of 1962, but in the Trading with the Enemy Act, 50 U.S.C. App. 1 *et seq.* Since the bulk of litigation arising under the TWEA comes into the district courts, plaintiffs assert that their challenge to the surcharge program belongs here, too. This amounts to a contention that Yoshida should not have filed its suit in the Customs Court, that the Customs Court should not have accepted jurisdiction, that the Court of Customs and Patent Appeals erred in reaching the merits of the challenge to the import surcharge program, that it erred a second time in adjudicating the *Alcan* case, and that Congress erred in holding up administrative protests pending completion of the *Yoshida* litigation. Since both Congress and the Court of Customs and Patent Appeals are authoritative sources of wisdom regarding Customs Court jurisdiction, and since the Supreme Court has chosen not to speak on the matter, plaintiffs ask too much of this tribunal in claiming the right to come before it. However, ambiguities in the jurisdictional lines between the Customs Court and the district courts and in the implications to be drawn from *Yoshida* merit brief clarification.

Plaintiffs argue that the TWEA is not considered a customs law, and that the district courts ordinarily have taken jurisdiction of questions arising under the Act. Assuming, therefore, that the *Yoshida* court was correct in locating the pertinent Congressional delegation of au-

thority within the TWEA, it should follow that the merits of the delegation question can be argued all over again, this time in the district court.

As defendants point out in their brief, the TWEA, as originally enacted in 1917, was strictly a war measure. Its purpose was to prohibit trade with wartime enemies and to authorize the President to seize enemy-owned property, administer it for the benefit of the United States, and dispose of it as Congress might direct.

Then, during the economic crisis of the 1930's Section 5(b) of the Act, 50 U.S.C. 5(b), was selected by Congress as a convenient foundation upon which to fashion a broad delegation to the President of peacetime regulatory power over the economy. At the outbreak of World War II, the President's 5(b) powers were enlarged still further, to authorize control, during either war or periods of declared national emergency, of all property in the United States owned by any foreign nation or citizen, friendly or otherwise. Thus, by 1941 the title of 50 U.S.C. App. 1 *et seq.* was a misnomer; Section 5(b) of the Act permitted the President, among other things, to "regulate" the "importation" of "any property" in which "any foreign country [sic]" had "any interest." This was the crucial language in the *Yoshida* decision.

Authority as broad as this permits the President to involve himself in a range of economic regulation, some of which would involve matters within the purview of the district courts and some within the exclusive jurisdiction of the Customs Court. That many matters arising under the TWEA, and under Section 5(b) in particular, are adjudicated by the district courts is beside the point; the

issue is where litigation involving the import surcharge program in particular belongs.[2]

It should be noted, first, that Presidential Proclamation 4074 levied "supplemental" charges upon articles already "dutiable." The structure of duties upon which the supplemental charges were superimposed are set out in the Tariff Schedules of the United States, whose limits are specifically legislated by Congress and whose administration is in the hands of the Bureau of Customs of the Treasury Department. The "protest" procedure of 19 U.S.C. § 1514, described previously, exists for the handling of challenges to the Tariff Schedules. As indicated above, not only does the procedure cover protests against the "amount of duties chargeable" and "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury," it also anticipates challenges to "the legality of all orders . . . entering into" decisions of customs officers. The language of 28 U.S.C. § 1582, which sets out the jurisdiction of the Customs Court, tracks the quoted language exactly, thereby providing judicial review of administrative dispositions of protests.

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[2] It follows that plaintiffs' reliance upon Section 9(a) of the Trading with the Enemy Act, 50 U.S.C. App. 9(a), to buttress its jurisdiction argument is without merit. Section 9(a) was enacted in 1917 to serve as a companion to the original version of Section 5(b). When Section 5(b) was amended in the 1930's and in 1941 to apply to situations involving not only alleged enemies but also peacetime periods of national emergency and business involvements with foreign nations in general, Section 9(a) was not modified to keep it pertinent to these situations. It is obvious on its face that 9(a) confers jurisdiction upon the federal district courts only to consider challenges to the wartime applications of Section 5(b) and to identifications of parties as "enemies". Section 9(a) is not relevant to those portions of Section 5(b) which empower the President to regulate foreign trade during peacetime.

The plain words of 28 U.S.C. § 1582 indicate that litigation involving the surcharge program belongs in the Customs Court. Moreover, given the unquestionable allocation to the Customs Court of challenges to the Tariff Schedules, including issues of their underlying constitutionality, *see J.C. Penny Company* v. *United States Treasury Dept.*, 439 F.2d 63, 65-67 (1971), it would be nonsensical to conclude that challenges to a program of surcharges built upon the Schedules should be matters within the jurisdiction of a different court:

> [P]roper administration of the customs laws requires a complete, integral, smooth-functioning system of customs law justice. Such an end could not be accomplished if customs issues were fractionalized so that the district courts deal with certain issues arising out of customs controversies while the Customs Court concerns itself with the remaining customs issues. *Penney, supra* at 66.

Apart from the inherent logic of restricting any further litigation over the surcharge program to the Customs Court, it should be noted that Congress recognized the jurisdiction of the Customs Court system over challenges to the surcharge program in its passage of Section 611 of the Trade Act of 1974, cited earlier. The Senate Finance Committee, which originated Section 611, referred to the *Yoshida* litigation in its Report on the Bill:

> This extension [for the processing of protests] would, in effect, represent a limited amendment to section 515(a) of the Tariff Act of 1930. The surcharge the above Presidential Proclamation 4074 was recently found in the Customs Court to be void as an

> ultra vires act on the part of the President. That decision was subsequently appealed. This section would permit the resolution of that appeal and any subsequent appeals without denying the thousands of protests already made. 1974 *U.S. Code Cong. and Admin. News* at 7363.

Congress having acknowledged the authority of the Customs Court over the surcharge program as the basis for amending national legislation, this Court has no hesitation in according the same deference to the Customs Court on the question of jurisdiction. The Court cannot help noticing, in addition, that the quoted provision suggests Congress' expectation that the *Yoshida* litigation would serve as a dispositive test case on the merits of the surcharge issue.

Plaintiffs' argument that the surcharge program should not be characterized as a customs matter because of its genesis in the Trading with the Enemy Act is undermined further by consideration of Section 122 of the Trade Act of 1974. That provision, now codified as 19 U.S.C. § 2132, authorizes the President specifically to impose temporary import surcharges whenever "fundamental international payments problems" require them. The Senate Report on the Bill justified the need for the provision "in light of the recent decision by the United States Customs Court which held that the 10 percent surcharge . . . was without advance authority." 1974 *U.S. Code Cong. and Admin. News* at 7237. In the face of a Congressional determination that a grant of explicit surcharge authority belonged within the Trade Act of 1974, plaintiffs cannot argue convincingly that a decision of the judiciary in 1975, to the

effect that general authority for the 1971 program rested in the TWEA, establishes the essential character of a surcharge program as involving something other than customs and trade matter.

In summary, this Court's consideration of the plain wording of the statute defining the jurisdiction of the Customs Court, of the close kinship between the country's basic tariff schedules and the surcharges superimposed on them, and of Congress' treatment of the *Yoshida* litigation convinces it that the Customs Court was correct in taking jurisdiction of challenges to the surcharge program. It follows from the provision for exclusivity in 28 U.S.C. § 1582 that this Court does not have jurisdiction. These conclusions are not affected by the possibility that some of the present plaintiffs before the Court might not have filed protests against the surcharge and thus have perfected their jurisdictional standing in a timely manner. The right to file a protest was well-established and was utilized by thousands of importers. This Court will not provide a remedy for parties who were lax in taking advantage of their appropriate legal rights.

JUNE L. GREEN
U.S. District Judge

Dated: November 23, 1977

Constitution of the United States, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes and Proclamations Involved.

(Including Presidential Proclamations 4074 and 40968 and Opinion No. 822 of the General Counsel of the Treasury)

Tariff Act of 1930, Section 350(a)(6), as Amended, 19 U.S.C. 1351 (a)(6).

(6) The President may at any time terminate, in whole or in part, any proclamation made pursuant to this section.

Trade Expansion Act of 1962, Section 255(b), as Amended, 19 U.S.C. Sec. 1885(b).

(b) The President may at any time terminate, in whole or in part, any proclamation made under this subchapter.

Trading With the Enemy Act, 40 Stat. 411, as Amended, 50 U.S.C. Sec. 1, et seq.

Trading With Enemy Act, 50 U.S.C. App. § 2.

§ 2. Definitions

The word "enemy", as used herein, shall be deemed to mean, for the purposes of such trading and of this Act [sections 1-6, 7-39 and 41-44 of this Appendix]—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

The words "ally of enemy," as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy."

The word "person," as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic.

The words "United States," as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or occupied by the military or naval forces thereof.

The words "the beginning of the war," as used herein, shall be deemed to mean midnight ending the day on which

Congress has declared or shall declare war or the existence of a state of war.

The words "end of the war," as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the "end of the war" within the meaning of this Act [sections 1-6, 7-39 and 41-44 of this Appendix].

The words "bank or banks," as used herein, shall be deemed to mean and include national banks, State banks, trust companies, or other banks or banking associations doing business under the laws of the United States, or of any State of the United States.

The words "to trade," as used herein, shall be deemed to mean—

(a) Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation.

(b) Draw, accept, pay, present for acceptance or payment, or indorse any negotiable instrument or chose in action.

(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

(d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property.

(e) To have any form of business or commercial communication or intercourse with.

Oct. 6, 1917, c. 106, § 2, 40 Stat. 411.

Section 5(b), 50 U.S.C. App. Section 5(b).

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exploration of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursunat to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to any thing done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

(3) As used in this subdivision the term "United States" means the United States and any place subject to the jurisdiction thereof: *Provided, however,* That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent

with the purposes of this subdivision, for any or all of the terms used in this subdivision. Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term "person" means an individual, partnership, association, or corporation.

Trading With the Enemy Act, Section 7(c), 50 U.S.C. App. Section 7(c).

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, chooses [sic] in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act [sections 1-6, 7-39 and 41-44 of this Appendix].

Any requirement made pursuant to this Act [sections 1-6, 7-39 and 41-44 of this Appendix], or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights

as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act [sections 1-6, 7-39 and 41-44 of this Appendix], and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

Trading With the Enemy Act, Section 9(a), 50 U.S.C. App. 9a

§ 9. Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover; sale of claimed property in time of war or during national emergency

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1-6, 7-39 and 41-44 of this Appendix], and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated: *Provided further,* That upon a determination made by the President, in time of war or during any national emergency declared by the President, that the interest and welfare of the United States require the sale of any property or interest or any part thereof claimed in any suit filed under this subsection and pending on or after the date of enactment [Oct. 22, 1962] of this proviso the Alien Property Custodian or any successor officer, or agency may sell such property or interest or part thereof, in conformity with law applicable to sales of property by him, at any time prior to the entry of final judgment in such suit. No such sale shall be made until thirty days have passed after the publication of notice in the Federal Register of the intention to sell. The net

proceeds of any such sale shall be deposited in a special account established in the Treasury, and shall be held in trust by the Secretary of the Treasury pending the entry of final judgment in such suit. Any recovery of any claimant in any such suit in respect of the property or interest or part thereof so sold shall be satisfied from the net proceeds of such sale unless such claimant, within sixty days after receipt of notice of the amount of net proceeds of sale serves upon the Alien Property Custodian, or any successor officer or agency, and files with the court an election to waive all claims to the net proceeds, or any part thereof, and to claim just compensation instead. If the court finds that the claimant has established an interest, right, or title in any property in respect of which such an election has been served and filed, it shall proceed to determine the amount which will constitute just compensation for such interest, right, or title, and shall order payment to the claimant of the amount so determined. An order for the payment of just compensation hereunder shall be a judgment against the United States and shall be payable first from the net proceeds of the sale in an amount not to exceed the amount the claimant would have received had he elected to accept his proportionate part of the net proceeds of the sale, and the balance, if any, shall be payable in the same manner as are judgments in cases arising under section 1346 of Title 28. The Alien Property Custodian or any successor offcer or agency shall, immediately upon the entry of final judgment, notify the Secretary of the Treasury of the determination by final judgment of the claimant's interest and right to the proportionate part of the net proceeds from the sale, and the final determination by judgment of the amount of just compensation in the event the claimant has elected to recover just compensation for the interest in the property he claimed.

28 U.S.C. 1582.

§ 1582. Jurisdiction of the Customs Court

(a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involves: (1) the appraised value of merchandise; (2) the classification and rate and amount of duties chargeable; (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury; (4) the exclusion of merchandise from entry or delivery under any provisions of the customs laws; (5) the liquidation or reliquidation of an entry, or a modification thereof; (6) the refusal to pay a claim for drawback; or (7) the refusal to reliquidate an entry under section 520(c) of the Tariff Act of 1930, as amended.

(b) The Customs Court shall have exclusive jurisdiction of civil actions brought by American manufacturers, producers, or wholesalers pursuant to section 516 of the Tariff Act of 1930, as amended.

(c) The Customs Court shall not have jurisdiction of an action unless (1) either a protest has been filed, as prescribed by section 514 of the Tariff Act of 1930, as amended, and denied in accordance with the provisions of section 515 of the Tariff Act of 1930, as amended, or if the action relates to a decision under section 516 of the Tariff Act of 1930, as amended, all remedies prescribed therein have been exhausted, and (2) except in the case of an action relating to a decision under section 516 of the Tariff Act of 1930, as amended, all liquidated duties,

charges or exactions have been paid at the time the action is filed.

(d) Only one civil action may be brought in the Customs Court to contest the denial of a single protest. However, any number of entries of merchandise involving common issues may be included in a single civil action. Actions may be consolidated by order of the court or by request of the patries, with approval of the court, if there are common issues.

Presidential Proclamation 4074, August 16, 1971, *1971 U.S. Code Congressional and Administrative News*, p. 2486.

PROCLAMATIONS

No. 4074

August 17, 1971, 36 F.R. 15724

IMPOSITION OF SUPPLEMENTAL DUTY FOR BALANCE OF PAYMENTS PURPOSES

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS, there has been a prolonged decline in the international monetary reserves of the United States and our trade and international competitive position is seriously threatened and, as a result, our continued ability to assure our security could be impaired;

WHEREAS, the balance of payments position of the United States requires the imposition of a surcharge on dutiable imports;

WHEREAS, pursuant to the authority vested in him by the Constitution and the statutes, including, but not limited to, the Tariff Act of 1930, as amended[9] (hereinafter referred to as "the Tariff Act"), and the Trade Expansion Act of 1962[10] (hereinafter referred to as "the TEA"), the President entered into, and proclaimed tariff rates under, trade agreements with foreign countries;

WHEREAS, under the Tariff Act [,] the TEA, and other provisions of law, the President may, at any time, modify or terminate in whole or in part, any proclamation made under his authority;

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[9] 19 U.S.C.A. § 1202 et seq.

[10] 19 U.S.C.A. prec. § 1202.

Presidential Proclamation 4074, August 16, 1971, 1971 U.S. Code Congressional and Administrative News, p. 2486.

NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, acting under the authority vested in me by the Constitution and the statutes, including, but not limited to, the Tariff Act, and the TEA, respectively, do proclaim as follows:

A. I hereby declare a national emergency during which I call upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States.

B. (1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.

(2) Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 percent ad valorem. Such supplemental duty shall be imposed on all dutiable articles imported into the customs territory of the United States from outside thereof, which are entered, or withdrawn from warehouse, for consumption after 12:01 a. m., August 16, 1971, provided, however, that if the imposition of an additional duty of 10 percent ad valorem would cause the total duty or charge payable to exceed the total duty or charge payable at the rate prescribed in column 2 of the Tariff Schedules of the United States, then the colmun 2 rate shall apply.

C. To implement section B of this Proclamation, the following new subpart shall be inserted after subpart B of part 2 of the Appendix to the Tariff Schedules of the United States:

Presidential Proclamation 4074, August 16, 1971, 1971 U.S. Code Congressional and Administrative News, p. 2486.

SUBPART C—TEMPORARY MODIFICATIONS FOR BALANCE OF PAYMENTS PURPOSES

Subpart C headnotes:

1. This subpart contains modifications of the provisions of the tariff schedules proclaimed by the President in Proclamation 4074.

2. **Additional duties imposed**—The duties provided for in this subpart are cumulative duties which apply in addition to the duties otherwise imposed on the articles involved. The provisions for these duties are effective with respect to articles entered on and after 12:01 a. m., August 16, 1971, and shall continue in effect until modified or terminated by the President or by the Secretary of the Treasury (hereinafter referred to as the Secretary) in accordance with headnote 4 of this subpart.

3. **Limitation on additional dutes**—The additional 10 percent rate of duty specified in rate of duty column numbered 1 of item 948.00 shall in no event exceed that rate which, when added to the column numbered 1 rate imposed on the imported article under the appropriate item in schedules 1 through 7 of these schedules, would result in an aggregated rate in excess of the rate provided for such article in rate of duty column numbered 2.

4. For the purposes of this subpart—

(a) Delegation of authority to Secretary—The Secretary may from time to time take action to reduce, eliminate or reimpose the rate of additional duty herein or to establish exemption therefrom, either generally or with respect to an article which he may specify either generally or as the product of a particular country, if he determines that such action is consistent with safeguarding the balance of payments position of the United States.

Presidential Proclamation 4074, August 16, 1971, 1971 U.S. Code Congressional and Administrative News, p. 2486.

(b) Publication of Secretary's actions—All actions taken by the Secretary hereunder shall be in the form of modifications of this subpart published in the Federal Register. Any action reimposing the additional duties on an article exempted therefrom by the Secretary shall be effective only with respect to articles entered on and after the date of publication of the action in the Federal Register.

(c) Authority to prescribe rules and regulations—The Secretary is authorized to prescribe such rules and regulations as he determines to be necessary or appropriate to carry out the provisions of this subpart.

5. **Articles exempt from the additional duties**—In accordance with determinations made by the Secretary in accordance with headnote 4(a), the following described articles are exempt from the provisions of this subpart:

* * * * * * * * * * *

Item	Article	Rates of duty	
		1	2
948.00	Articles, except as exempted under headnote 5 of this subpart, which are not free of duty under these schedules and which are the subject of tariff concessions granted by the United States in trade agreements	10% ad val. . . (See headnote 3 of this subpart.)	No change.

Presidential Proclamation 4074, August 16, 1971, 1971 U.S. Code Congressional and Administrative News, p. 2486.

D. This Proclamation shall be effective 12:01 a. m., August 16, 1971.

IN WITNESS WHEREOF, I have hereunto set my hand this fifteenth day of August in the year of our Lord nineteen hundred and seventy-one, and of the Independence of the United States of America the one hundred and ninety-sixth.

RICHARD NIXON.

Presidential Proclamation 4098, December 20, 1971, *1971 U.S. Code Congressional and Administrative News*, p. 2512.

PROCLAMATIONS

No. 4098

December 22, 1971, 36 F.R. 24201

TERMINATION OF ADDITIONAL DUTY FOR BALANCE OF PAYMENTS PURPOSES

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS, in order to impose a surcharge required by the balance of payments position of the United States, Proclamation 4074, dated August 15, 1971, terminated in part for such period as necessary prior Presidential Proclamations insofar as such proclamations were inconsistent with, or proclaimed duties different from, those made effective pursuant to the terms of Proclamation 4074;

WHEREAS, a multilateral agreement has been reached among the Group of Ten major industrial nations which permits removal of the surcharge;

WHEREAS, under section 350(a) (6) of the Tariff Act of 1930, as amended[24] (hereinafter referred to as "the Tariff Act"), and section 255(b) of the Trade Expansion Act of 1962 (hereinafter referred to as "the TEA")[25] and other authority, the President may, at any time, terminate, in whole or in part, for such period as may be necessary, any proclamation, issued pursuant to section 350 of the Tariff Act or Title II of the TEA;

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[24] 19 U.S.C.A. § 1351(a) (6).

[25] 19 U.S.C.A. § 1885(b).

Presidential Proclamation 4098, December 20, 1971, 1971 U.S. Code Congressional and Administrative News, p. 2512.

WHEREAS, under section 350(a) (1) (B) of the Tariff Act[26] and section 201(a) (2) of the TEA,[27] the President may proclaim modifications of any existing duty as he determines to be required or appropriate to carry out trade agreements entered into under the authority of those Acts; and

WHEREAS, I hereby determine that modification of existing duties to restore the rates of duty applicable on August 15, 1971, terminated in part for such period as necessary by Proclamation 4074,[28] is required or appropriate to carry out such trade agreements;

NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, acting under the authority vested in me by the Constitution and the statutes, including, but not limited to, the Tariff Act, and the TEA, respectively, do proclaim as follows:

A. I hereby terminate paragraphs B and C of Proclamation 4074.

B. I hereby proclaim such modification of duties as is necessary to restore the rates of duty in effect on August 15, 1971.

C. To implement this Proclamation, the subpart inserted after subpart B of part 2 of the Appendix to the Tariff Schedules of the United States, entitled "SUBPART C—TEMPORARY MODIFICATIONS FOR BALANCE OF PAYMENTS PURPOSES" is deleted therefrom.

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[26] 19 U.S.C.A. § 1351(a) (1) (B).

[27] 19 U.S.C.A. § 1822(a) (2).

[28] 19 U.S.C.A. prec. § 1202 note.

Presidential Proclamation 4098, December 20, 1971, 1971 U.S. Code Congressional and Administrative News, p. 2512.

D. This Proclamation shall be effective with respect to merchandise entered, or withdrawn from warehouse, for consumption on or after December 20, 1971.

IN WITNESS WHEREOF, I have hereunto set my hand this twentieth day of December in the year of our Lord nineteen hundred and seventy-one, and of the Independence of the United States of America the one hundred and ninety-sixth.

RICHARD NIXON.

Opinion, General Counsel, Treasury Department, No. 822.

THE GENERAL COUNSEL OF THE TREASURY
Washington, D.C. 20220

(SEAL) Sep 29 1971

Opinion of the General Counsel

LEGAL BASIS FOR THE IMPOSITION OF A SURCHARGE

On August 15, 1971, the President issued Proclamation No. 4074 (36 F.R. 15724, August 17, 1971) by which he terminated in part prior proclamations which carried out trade agreements in order to provide, for such period as may be necessary, an additional 10 percent *ad valorem* duty on dutiable imports.

The statutory authority for imposition of the surcharge by terminating prior proclamations is found in section 350(a)(6) of the Tariff Act of 1930, as amended (19 U.S.C. 1351; hereinafter the "Tariff Act"), and section 255(b) of the Trade Expansion Act of 1962 (19 U.S.C. 1885; hereinafter the "TEA"). The authority for reinstatement of concession rates is contained in these provisions as well as in section 201(a)(2) of the TEA (19 U.S.C. 1821) and section 350(a)(1)(B) of the Tariff Act (19 U.S.C. 1351).

Termination of Tariff Concession Proclamations

Pursuant to a legislative grant of authority, the President has entered into international trade agreements providing for concession rates of duty on a broad range of products. In order to give domestic effect to these international agreements, Presidential proclamations have established concession rates in the Tariff Schedules of the United States (19 U.S.C. 1202). It is these proclamations that the President terminated in part in order to impose the surcharge by establishing an additional 10 percent *ad*

valorem rate of duty.* The total rate of duty, including the additional rate of duty, is in no case higher than the column 2 statutory rate, and in most cases is an intermediate rate between the column 2 rate and the most recent concession rate.

This action to impose an additional duty was taken by the President under sections 350(a)(6) of the Tariff Act and 255(b) of the TEA. Under these sections, Congress authorized the President to "at any time terminate, in whole or in part, any proclamation" made to carry out trade agreements under these Acts. With respect to some articles, particularly those to which application of the surcharge has resulted in a total rate of duty equal to the full column 2 rate, the President has used his full power to terminate prior proclamations (insofar as the rate is concerned); and with respect to other articles for which intermediate rates were established, he used his authority to terminate in part (insofar as the rate is concerned).

There are no conditions or qualifications placed on the President's termination authority under sections 350(a)(6) or 255(b). There is no evidence in the legislative history either of the Tariff Act or of the TEA that the President's authority to terminate prior proclamations was to be any less broad than its language would suggest. On the contrary, the retention of the same unqualified language for almost forty years although there have been numerous

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* Paragraph B of Proclamation 4074 states in relevant part:

"(1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.

"(2) Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 percent ad valorem. . . ."

amendments of the trade agreements authority indicates a Congressional intention to grant to the President broad discretionary power in this area. When originally enacted in 1934 as part of the Reciprocal Trade Agreements Act (48 Stat. 943), the termination authority formed the concluding sentence of subsection (a)(2) of section 350, and provided: "The President may at any time terminate any such proclamation in whole or in part." Although Congress frequently amended other provisions of section 350(a) of the Tariff Act, the termination authority remained unqualified. In 1962, when Congress passed the TEA, it repealed (section 257(b) of the TEA) portions of section 350(a), but retained the termination authority as part of the Tariff Act and added this same unqualified authority to terminate proclamations to the TEA.

In addition, the courts have generally given a broad construction to the President's termination powers and have refused to imply limitations on these powers. *American Bitumuls and Asphalt Co. et al.* v. *United States,* 44 CCPA 199 (1957), *cert. den.* 355 U.S. 883 (1957); *United States* v. *Metropolitan Petroleum Corp.,* 42 CCPA 38 (1954); *Baer* v. *United States,* 8 Cust. Ct. 104 (1942); and *Barclay and Company, Inc.* v. *United States,* 41 Cust. Ct. 135, C.D. 2031 (1958), *affirmed,* 47 CCPA 133, C.A.D. 745 (1960).

Thus, the language of the statute, the legislative history and the broad interpretation given to the termination authority by the courts clearly show that the President had authority under sections 350(a)(6) of the Tariff Act and 255(b) of the TEA to impose the import surcharge.

The Restoration of Previously Proclaimed Tariff Concession Rates

The further question has been raised of whether the power to terminate trade agreement proclamations vested

in the President by Congress is confined solely to ending completely the application of a concession rate granted under an international agreement or whether the President may restore by proclamation the terminated rate at a future time pursuant to the still valid international trade agreement providing for the concession rate.

The President has authority under the words "in part" contained in sections 255(b) of the TEA and 350(a)(6) of the Tariff Act to suspend proclamations implementing trade agreements by terminating them for a period of time.

In addition, there is authority in section 201(a)(2) of the TEA and section 350(a)(1)(B) of the Tariff Act to implement trade agreements by restoring previously terminated concession rates. Section 201 of the TEA which contains the basic authority of the Executive for trade agreements provides in relevant part:

> SEC. 201. BASIC AUTHORITY FOR TRADE AGREEMENTS.
>
> (a) Whenever the President determines that any existing duties or other import restrictions of any foreign country or the United States are unduly burdening and restricting the foreign trade of the United States and that any of the purposes stated in section 102 will be promoted thereby, the President may—
>
> (1) after June 30, 1962, and before July 1, 1967, enter into trade agreements with foreign countries or instrumentalities thereof; and
>
> (2) proclaim such modification or continuance of any existing duty . . . as he determines to be required or appropriate to carry out any such trade agreement.

Similar authority for proclaiming modifications of existing duties is contained in section 350(a)(1)(B) of the Tariff Act.

Thus, under both the TEA and the Tariff Act, the President is authorized to proclaim changes in existing duties whenever he determines that such changes are required or appropriate to carry out any trade agreements entered into under the authority of these Acts. In the present case, modifications of existing duties to remove the surcharge and reinstitute the full concession rates would clearly be appropriate to carry out prior trade agreements entered into under the authority of the TEA and the Tariff Act. The continuing validity of these trade agreements was in no way affected by Proclamation No. 4074 and they remain in full effect.

The time limitation applicable to the authority for entering into new agreements (*i.e.*, after June 30, 1962, and before July 1, 1967) under the TEA is not applicable to proclaiming the internal effectiveness of trade agreements entered into prior to July 1, 1967. The language of section 201 makes clear that the time limitation applies solely to entering into new trade agreements and not to proclaiming the internal effect of trade agreements entered into prior to July 1, 1967. Moreover, the legislative history explicitly supports this interpretation of the statutory language. The technical explanation of the bill in the House Report of the Trade Expansion Act of 1962 specifically provides that there is no time period in which proclamations under section 201(a)(2) must be issued. (H. Rept. No. 1818, 87th Cong., 2d Sess., 34 (1962)). Similarly, time limitation provisions in section 350 of the Tariff Act have no application to the proclamation authority contained in section 350(a)(1)(B).

Conclusion

It is concluded, therefore, that the President has authority under the Tariff Act of 1930, as amended, and the

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Trade Expansion Act of 1962 to levy the additional duty and at a later date to restore the Tariff concessions that had been terminated.

SAMUEL R. PIERCE, JR.
Samuel R. Pierce, Jr.
General Counsel

No. 78-1788

In the Supreme Court of the United States

OCTOBER TERM, 1978

HENRY POLLAK, INC., ET AL., PETITIONERS

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

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HENRY POLLAK, INC., ET AL., PETITIONERS

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that the district court erred in ruling that it lacked jurisdiction to consider their challenge to a 10% import duty surcharge imposed by the President in 1971.

1. In August 1971, in response to the growing United States balance of payments deficit, President Nixon imposed a supplemental duty on imported goods (Pet. App. 4a-5a). The Presidential proclamation that effected this action (Pet. App. 27a-31a) was terminated by another such proclamation issued four months later (Pet. App. 32a-34a), after the United States and other major industrial nations had reached a multilateral agreement designed to alleviate the balance of payments problem.

Petitioners are importers who paid the supplemental import duty during the four-month period it was in effect. At least some petitioners filed protests with the United States Customs Service, in accordance with 19 U.S.C. 1514 (Pet. App. 5a). Other importers also filed such protests. They all argued that the President lacked the statutory and constitutional authority to impose an import duty surcharge.

One of the protesting importers, not a petitioner in the present case, was Yoshida International, Inc. When the Customs Service denied Yoshida's protest, the company filed suit in the United States Customs Court, invoking the court's jurisdiction under 28 U.S.C. 1582 and challenging the President's authority to impose the surcharge by proclamation. The Customs Court held that the President's action exceeded the authority delegated to him by Congress and that the import charge was therefore invalid. 378 F. Supp. 1155 (1974).

While the government's appeal was pending in the Court of Customs and Patent Appeals, Congress passed the Trade Act of 1974, 88 Stat. 1978. Two provisions of the Act are relevant to the present dispute. Section 122(a) empowered the President to impose temporary import duty surcharges in response to "large and serious United States balance-of-payments deficits" and thus removed all doubt about the statutory authority for future Presidential proclamations like that issued in August 1971. See 88 Stat. 1987-1988 (now codified at 19 U.S.C. 2132(a)).[1] Section 611 of the Act, 88 Stat. 2075-2076, taking account

[1]At the same time, Section 122(h) of the 1974 Act, 88 Stat. 1989, made clear that in the future the President could not rely on statutes authorizing the termination of tariff concessions, such as the Tariff Act of 1930 and the Trade Expansion Act of 1962, as the legal basis for the imposition of an import duty surcharge.

of the *Yoshida* litigation and the numerous pending administrative protests concerning the 10% surcharge, extended the time for administrative review of such protests to five years after their filing.[2] The Senate report explained that Section 611 "would permit the resolution of [the *Yoshida*] appeal and any subsequent appeals without denying the thousands of protests already made." S. Rep. No. 93-1298, 93d Cong. 2d Sess. 235 (1974). Accordingly, the Customs Service deferred further action on importers' protests pending final resolution of the *Yoshida* litigation.

In November 1975, the Court of Customs and Patent Appeals reversed the decision of the Customs Court and held that "the President's action under review was within the power constitutionally delegated to him" in Section 5(b) of the Trading With the Enemy Act, 50 U.S.C. App. 5(b). *United States* v. *Yoshida International, Inc.*, 526 F. 2d 560, 584. Like the Customs Court, the Court of Customs and Patent Appeals rejected the government's argument that Congress had provided adequate statutory authority for the 10% import surcharge in Section 350(a)(6) of the Tariff Act of 1930, 19 U.S.C. 1351(a)(6), and Section 255(b) of the Trade Expansion Act of 1962, 19 U.S.C. 1885(b).[3] The appellate court ruled, however, that Section 5(b) of the Trading With the Enemy Act authorized the President, during any national emergency

[2]Ordinarily, 19 U.S.C. 1515 requires that the Customs Service decide whether to allow or deny a protest within two years of the filing date.

[3]The General Counsel of the Treasury Department had relied exclusively on the Tariff Act and the Trade Expansion Act in his September 1971 opinion finding sufficient legal basis for the imposition of a surcharge by Presidential proclamation. See Pet. App. 35a-40a.

declared by the President, to regulate importation by imposing an import duty surcharge.[4] The court further held that the exercise of the authority in the August 1971 proclamation was within the scope of a constitutionally permissible delegation of legislative power, because it was closely tied to existing tariff schedules established by Congress and was reasonably related to the power delegated and the emergency confronted. The court reaffirmed this result the following year in a suit brought by another importer, *Alcan Sales* v. *United States*, 534 F. 2d 920. This Court denied certiorari, 429 U.S. 986 (1976).

Subsequently, petitioners filed the present action in the United States District Court for the District of Columbia. Like the plaintiffs in *Yoshida* and *Alcan Sales*, they challenged the President's authority to impose the 10% import surcharge. Petitioners invoked the district court's jurisdiction under Section 9(a) of the Trading With the Enemy Act, 50 U.S.C. App. 9(a). They asserted that Section 9(a) manifested a congressional intention that suits under the Act should be litigated in the federal district courts. They argued further that, because the Court of Customs and Patent Appeals had identified Section 5(b) of the Acts as the source of the President's authority to impose the import surcharge, challenges to the surcharge could properly be brought in the district court.

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[4]In 1977 Congress amended Section 5(b) to provide that the President may exercise his powers under the Section only in times of war declared by Congress. 91 Stat. 1625. At the same time, Congress passed the International Emergency Economic Powers Act, 91 Stat. 1627-1629 (to be codified at 50 U.S.C. 1701-1706), granting the President substantial authority to regulate certain international economic transactions in times of national emergency declared by the President in response to "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States * * *."

The district court disagreed and dismissed the suit for lack of jurisdiction (Pet. App. 3a-13a). The court held that 28 U.S.C. 1582 confers on the Customs Court exclusive jurisdiction over actions concerning the "rate and amount of duties chargeable." The court concluded that the character of petitioners' lawsuit was not affected by the source of the President's statutory authority to impose the import surcharge. The critical factor, in the court's view, was the subject matter of the complaint: a challenge to a system of supplemental charges superimposed on the detailed tariff schedules already enacted by Congress and applicable, therefore, only to articles already subject to import duty as the result of earlier legislative action. The court stated (Pet. App. 11a; citation omitted):

> [G]iven the unquestionable allocation to the Customs Court of challenges to the Tariff Schedules, including issues of their underlying constitutionality, it would be nonsensical to conclude that challenges to a program of surcharges built upon the Schedules should be matters within the jurisdiction of a different court * * *.

The court of appeals affirmed without opinion (Pet. App. 1a-2a). The court stated in its judgment that it agreed with the result reached by the district court, "generally for the reasons given in [that court's] memorandum opinion."

2. The district court correctly held that it lacked jurisdiction to consider petitioners' claim for refund of the additional duties paid under the 1971 import surcharge. Section 1582 of the Judicial Code, 28 U.S.C. 1582, commits such duty refund suits to the exclusive jurisdiction of the Customs Court. The scope of the exclusive jurisdiction conferred by Section 1582 becomes clear

when that provision is read in conjunction with 19 U.S.C. 1514. The latter statute provides that, with certain limited exceptions not relevant here, the decisions of the appropriate customs officer, including the legality of all orders, concerning "the classification and rate and amount of duties chargeable * * * shall be final and conclusive * * * unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest * * * is commenced in the United States Customs Court in accordance with section 2632 of title 28 * * *." Section 1582, in turn, provides the jurisdictional base for the civil actions described in 28 U.S.C. 2632, *i.e.*, actions contesting a Customs Service denial of a protest filed in accordance with the governing law. Thus, a customs officer's decision regarding the amount of duty owed on imported goods is final unless a protest is filed under 19 U.S.C. 1514, and the Service's rulings on such protests can be reviewed only in civil actions lying within the exclusive jurisdiction of the Customs Court.

The foregoing discussion is not affected by the statutory authority under which a particular import duty is imposed. Whether the 1971 surcharge was authorized by the Tariff Act of 1930 or the Trade Expansion Act of 1962 or the Trading With the Enemy Act, the administrative and judicial mechanism for review of complaints concerning the amount of duty charged remains the same. The statute requiring the filing of a protest with the Customs Service, 19 U.S.C. 1514, does not distinguish in any way between import duties imposed under one grant of legislative authority rather than another.

Moreover, the jurisdictional provision on which petitioners rely, Section 9(a) of the Trading With the

Enemy Act, does not in terms confer any jurisdiction on the federal district courts to hear suits concerning import duties paid to customs officers. Nor is Section 9(a) a general jurisdictional statute, authorizing district courts to entertain all disputes arising under the Trading With the Enemy Act. Rather, Section 9(a) refers only to suits involving "money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder * * *." Petitioners in the present case have not paid any money to the Alien Property Custodian (see 50 U.S.C. App. 6), nor has the Custodian seized any of petitioners' property. The jurisdictional grant in Section 9(a) therefore has no application here.

But even if the district court were the proper forum for petitioners' complaint, their challenge to the validity of the 1971 surcharge would be unavailing. For the reasons stated in the government's brief in opposition in *Alcan Sales*, *supra* (No. 76-312),[5] the Court of Customs and Patent Appeals correctly decided that the President acted within the scope of his statutory authority when he imposed the 10% import surcharge. Moreover, the underlying substantive question at issue in this case is of little or no continuing importance, since Congress, in the Trade Act of 1974, unmistakably granted the President authority to impose temporary import surcharges for balance-of-payments purposes. See 19 U.S.C. 2132(a). Under these circumstances, further review of the district court's construction of Section 9(a) of the Trading With the Enemy Act and its interaction with the Customs Court's exclusive jurisdiction under 28 U.S.C. 1582 is not warranted.

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[5]A copy of the brief in opposition in *Alcan Sales* has been sent to petitioners.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JULY 1979

DOJ-1979-07

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1788

HENRY POLLAK, INC., ET AL.,

Petitioners,

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONSE TO RESPONDENTS' MEMORANDUM IN OPPOSITION

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Solely to correct patent errors in points raised by the Solicitor General in the Memorandum for the Respondents In Opposition to the Writ of Certiorari, petitioners, by their attorneys, file this response.

1. Unlike the plaintiffs in *Yoshida International, Inc.* v. *United States*, 71 Cust. Ct. 1, C.D. 4550, 387 F. Supp. 1155 (1974), *revs'd, United States* v. *Yoshida International, Inc.*, 63 CCPA 15, C.A.D. 1160, 526 F. 2d 560 (1975), and in *Alcan Sales Division* v. *United States*, 63 CCPA 83, C.A.D.

1170, 524 F. 2d 937, *cert. den.*, 389 U.S. 976 (1976), petitioners do not here, nor have they ever in these suits, challenged the authority of the President to impose the supplemental duty assessment characterized by the Government as an import surcharge.

Petitioners have, on the contrary, sought the relief provided by the Congress of the United States in the Trading with the Enemy Act (TWEA) by instituting statutory suit against the Treasurer of the United States and others. The TWEA provides that suits in equity shall be brought in the District Courts, and *only* in the District Courts. The TWEA is the sole source for the power exercised by the President in this matter, and the sole source in law, by its very terms, for any relief. The Solicitor General misstates the entire nature of petitioners' cause of action (Memo., p. 4), in likening petitioners' suits in the District Court to the suits in *Alcan* and *Yoshida, supra.*

2. Respondents further state (Memo., p. 5) that the Courts below concluded that the nature of petitioners' suits has nothing to do with the *source* of statutory authority under which petitioners assert their rights. This conclusion constitutes the fundamental error of those courts and the fundamental violation of the rights of the corporate citizen-petitioners. It is a doctrine as yet unknown to our law. The source of executive action must be the law. The remedy must follow the law, and if that law be statutory, must follow the statute.

By what right did the President act, was the question posed by the *Yoshida* and *Alcan* suits. The response was that he acted by virtue of the TWEA, a specific statute passed by Congress for specific purposes, and providing an exclusive remedy for alleged abuse, its own section 9(a). The question, quite different, posed by these suits brought in equity under section 9(a) is: by what right does the Treasurer of the United States *retain* the property of

citizens, neither enemies or allies of enemies of the United States, under the TWEA? It is not a response to that question to say that the Customs Court should have jurisdiction of the matter because the President made use of the Customs Service in taking the monies of citizens, because the TWEA provides a sole form of relief, *i.e.*, suit in the District Courts, for takings by virtue of the powers grated in it to the Executive. Therefore, to ignore the *source* of the Presidential power exercised in imposing the surcharge, is to ignore the fundament of our legal system and to exalt Executive prerogative in acting through the manifold agencies of the Federal Government above the legal framework enacted by Congress for the correction of abuses of such prerogative, which framework requires scrutiny of the specific Executive actions involved in the *retention* of the property of citizens under the TWEA by the District Courts sitting in equity.

3. The purpose of the instant petition is to have this Court correct the patent error of the Courts below: dismissal of suits provided for specifically by the Congress of the United States in the TWEA by considering not the *source* in law of the powers found to have been exercised, but the form of their exercise. This error caused the Courts below to shirk their duty to interpret a statute of the United States. No more grievous complaint could be brought before this Court by citizens of the United States. The source in law of Presidential and Executive actions may not be allowed to be obscured by form, as has been done here, for our Republic operates only by force of law. A law which cannot be enforced by the Courts constituted specifically by Congress to do so, must deprive citizens of the due process of law guaranteed them by the Constitution, rendering such law itself unconstitutional. *See: Central Union Trust Co.* v. *Garvan*, 254 U.S. (1921), *Becker Steel Co.* v. *Cummings*, 296 U.S. 74 (1935), *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480 (1945),

and *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), as regards the constitutionality of the Trading with the Enemy Act.

Wherefore, petitioners again pray that this Court may grant the writ here requested or summarily reverse the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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September, 1979